89- 1480

No. _____

In The

Supreme Court of the United States

October Term, 1989

MARGARET ANN DURAN,

Petitioner,

v.

STATE OF TEXAS, GEORGE S. BAYOUD, JR.,
Secretary of State of the State of Texas,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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March 19, 1990

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QUESTIONS PRESENTED

1. Does the failure of the Texas Supreme Court to issue a writ of mandamus directing the Texas Secretary of State to grant petitioner's application for a corporate charter violate petitioner's First Amendment rights to commercial speech when the corporate charter was applied for under a name truthfully describing the services petitioner intends to provide through that corporation?

2. Does the failure of the Texas Supreme Court to issue a writ of mandamus directing the Secretary of State of Texas to grant petitioner's application for a corporate charter under a trade name which truthfully describes the lawful services petitioner intends to provide through that corporation violate petitioner's right to that charter when the petitioner's application met all of the qualifications for a corporate charter, and the granting of said charter is a purely ministerial function of the Secretary of State?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Margaret Ann Duran and the Secretary of State for the State of Texas, an office now held by respondent George S. Bayoud, Jr. The respondents before this Court include the State of Texas.

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II. The failure of the Texas Supreme Court to issue a writ of mandamus directing the Texas Secretary of State to grant petitioner's application for a corporate charter under a trade name truthfully describing the lawful services petitioner intends to provide through that corporation violates petitioner's right to that charter because her application met all of the lawful qualifications for a corporate charter, and the granting of said charter therefore is a purely ministerial function of the Secretary of State 8

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No. _____

In The

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October Term, 1989

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v.

STATE OF TEXAS, GEORGE S. BAYOUD, JR.,
Secretary of State of the State of Texas,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The petitioner Margaret Ann Duran respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Texas, entered in the above entitled proceeding on November 8, 1989.

OPINIONS BELOW

The Supreme Court of Texas issued no opinion in the proceedings below. Petitioner was informed by letter dated December 18, 1989, to Francis G. Culhane, the attorney representing her in the proceedings below, that that court, on November 8, 1989 had denied her petition for

writ of mandamus. The letter to Attorney Culhane as well as the order of which it speaks are attached in the appendix, p. A-29 infra.

JURISDICTION

This Court has jurisdiction over this case pursuant to 28 U.S.C. 1257(a).

Because a petition for writ of mandamus to an official of the State of Texas must be initiated in the Supreme Court of Texas, there are no proceedings from courts below, other than the action of the Supreme Court of Texas in refusing to grant Ms. Duran's petition, an action taken without explanation by that Court.

STATEMENT OF THE CASE

Petitioner, Margaret A. Duran has substantial experience in the accounting field. She is attempting to establish an accounting practice in her home town of San Angelo, Texas.

On June 15, 1988, Ms. Duran mailed duplicate originals of the Articles of Incorporation of her intended corporation, "Duran's Accounting and Tax Service" to Mr. Jack M. Rains, then Secretary of State of Texas. (App., p. A-19) She enclosed with that application payments of all fees associated with an application for a corporate charter. (App., p. A-23)

On June 22, 1988, Ms. Duran received a reply to her application, dated June 20, 1988, from Mr. Rains. (App., p.

A-24-26) That reply informed Ms. Duran that her application was denied on the grounds that:

"You cannot have accounting in your corporate name it implies an unlaw (sic) purpose for a business corporation." (App., p. A-25)

Although the refusal of Mr. Rains to grant Ms. Duran's request for a corporate charter was not expressly stated as based on any statutory authority, that refusal must have been based on the Public Accountancy Act of 1979, Article 41a-1 Section 8. (App., p. A-29), prohibiting titles and trade names that inaccurately indicate licensed status.

The above language of Mr. Rains meant that Ms. Duran was not to include the word "accounting" in her corporate name because he believed that consumers would be misled by the word since Ms. Duran is not a certified public accountant (CPA).

Mr. Rains denied Ms. Duran's application despite the fact that her intended corporate name was completely truthful (Ms. Duran never claimed to be a CPA) and she had met all of the other conditions for receiving a corporate charter.

On October 18, 1989, Ms. Duran filed a petition in the Supreme Court of Texas requesting a writ of mandamus be issued directing Mr. George S. Bayoud, Jr., successor to Mr. Rains as Secretary of State of Texas, to issue the corporate charter for which she had applied. (App., p. A-2)

Ms. Duran's petition for writ of mandamus was denied by order dated November 8, 1989. (App., p. A-1) No order of the Court indicating such action was provided to Ms. Duran or her attorney until a certified copy of said

order, under cover of a letter dated December 18, 1989, was provided to her attorney. (App., p. A-28)

REASONS FOR GRANTING THE WRIT

I.

The failure of the Texas Supreme Court to issue a writ of mandamus directing the Secretary of State of Texas to grant petitioner's application for a corporate charter violates petitioner's First Amendment rights to commercial speech; the corporate charter was applied for under a name which truthfully describes the services petitioner intends to provide through that corporation, and there is no other apparent basis for denial of the charter by the State of Texas.

The Texas Secretary of State's restriction on Ms. Duran's chosen trade name, and his refusal to issue her a corporate charter under that name violate Ms. Duran's First Amendment rights to commercial speech, in contravention of the teachings of this Court. In particular, it is inconsistent with this Court's ruling in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

In *Central Hudson*, this court set forth a four-pronged test for determining whether certain commercial speech was due protection under the First Amendment.

> For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly

> advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.
>
> 477 U.S. at 566.

Presumably, the position of the State of Texas is that the use of the term "accountant" by a person who is not a CPA is misleading *per se* and therefore fails the first prong of the *Central Hudson* test. However, careful analysis suggests that this is not so. In fact, the Texas courts themselves have specifically defined the term "accountant" much more expansively than the definition of a Certified Public Accountant:

> "One engaged in rendering accounting or auditing service, . . . on a fee basis . . . but generally not possessing all the qualifications of education or experience required of a certified public accountant. . . ."

Texas State Board of Public Accountancy v. Fulcher, 515 S.W.2d 950, 956 (Tex. Civ. App. Corpus Christi, 1974).

Thus, anyone engaged in the above services or activities is engaged in "accounting" and is therefore an "accountant". So, the use of the term "accounting" or "accountant" by an unlicensed, or non-CPA accountant is not at all misleading. Therefore, Ms. Duran's selection of the term "accounting" for inclusion in her chosen trade name for her corporation was not misleading and not in violation of the first prong of the *Central Hudson* test.

Although the State of Texas has a strong governmental interest in protecting its citizens from misleading trade names, there is no misleading trade name here. Since no extraordinary governmental interest was asserted in barring Ms. Duran from use of her chosen trade

name, Ms. Duran's choice of a name for her intended corporation should be accorded the First Amendment protection of commercial speech that it is due.

Because there is no governmental interest at issue here, there is no such issue to evaluate concerning the question whether the governmental action in prohibiting Ms. Duran's commercial speech advances that governmental interest. Similarly, since there is no governmental interest at issue here, the Texas governmental action in prohibiting Ms. Duran's commercial speech was, perforce, more extensive than was necessary to serve that interest. Therefore, under the *Central Hudson* test, the Texas government violated Ms. Duran's First Amendment rights to protection of her commercial speech.

This Court first clearly extended First Amendment protection to purely commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 478 (1976). The "core notion of commercial speech" is "speech which does no more than propose a commercial transaction" according to *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983); *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 385 (1973) and other cases, although this does not exhaust the definition of commercial speech. The utilization of terms such as "accounting," "accounting services," and "accountant" – terms which accurately describe services non-CPA accountants may lawfully perform – clearly is intended to inform the public that these services may be obtained, for fees, from those using the terms. The message of such words is essentially the same as "I will sell you X drug at Y price" – words held to be constitutionally protected speech in *Virginia State Board of Pharmacy v.*

Virginia Citizens Consumer Council, Inc., supra. This Court has noted that the free flow of commercial speech is vital to the proper functioning of our nation's free enterprise system. *Virginia State Board of Pharmacy, supra,* 425 U.S. at 765; *Central Hudson Gas & Electric Corp. v. Public Service Com'n, supra.*[1] Prohibiting the flow of such information by forbidding non-CPA accountants to use the terms "accountant" will have the practical consequences not only of diverting at least some of the trade of those relatively more affluent consumers of accounting services who might prefer the services of non-CPA accountants to CPAs but also of keeping the small business operations that traditionally depend on the services of non-CPA accountants from obtaining any accounting services at all because of their inability to find them. One reason commercial speech was accorded the protection of the First Amendment was to avoid such consequences. See *Bates & O'Steen v. State Bar of Arizona,* 433 U.S. 350, 364 (1977); *Zauderer v. Office of Disciplinary Council,* 471 U.S. 626, 646 (1985).

Moreover, even when the use of a term in commercial speech has the potential to be used in a misleading manner, absolute prohibition is not a constitutionally accepted option "if the information may be presented in a way that is not deceptive." *In re R.M.J.,* 455 U.S. 191, 203. See also *Board of Trustees of the State Univ. of New York v. Fox,* 109 S. Ct. 3028, 3035 (1989). The total prohibition here

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[1] This vital role of commercial speech is surely the reason why the doctrine "has demonstrated remarkable vigor" despite its "relative infancy." See Tribe, *American Constitutional Law* 895 (2d ed. 1988).

of use of the term "accounting" by Ms. Duran clearly reaches well beyond any legitimate fear the state may have that non-CPA accountants will pass themselves off as CPAs. Such explicit misrepresentation would indeed justify action but there is no indication whatever that such assertions of licensed status have been made or are likely to be made by Ms. Duran. Even if there were such indication, that would justify only an appropriately limited approach. The mere use of the term "accountant" by one who may legally offer to the public services generally viewed as accounting by the public is not deceptive *per se;* efforts to label it as such infringe free speech rights. *Comprehensive Accounting Services v. Maryland,* 397 A.2d 1019 (Md. 1979).

By denying Ms. Duran's petition for a writ of mandamus directing the Secretary to grant her application for a corporate charter, the Texas Supreme Court failed to accord the proper First Amendment protection of commercial speech due to Ms. Duran.

II.

The failure of the Texas Supreme Court to issue a writ of mandamus directing the Texas Secretary of State to grant petitioner's application for a corporate charter under a trade name truthfully describing the lawful services petitioner intends to provide through that corporation, violates petitioner's right to that charter because the petitioner's application met all of the lawful qualifications for a corporate charter, and the granting of said charter therefore is a purely ministerial function of the Secretary of State.

In order to qualify for a corporate charter in Texas, an applicant must mail duplicate originals of the intended

corporation's Articles of Incorporation to the Texas Secretary of State (Secretary) and pay all required fees (e.g. filing fee, franchise tax deposit and the like).

The Secretary, through his Corporations Division, then reviews the application. Applications are answered with forms on which members of the Secretary's staff can mark conditions which must be met in order to qualify for the charter. There are also spaces to mark the reasons why an application may be denied. For example, a charter can be denied if another company is already chartered in the same name. A charter may be denied if the name does not reveal the corporate nature of the corporation. When a charter is denied or delayed for these or similar reasons, it appears that correction of any of these inadequacies will result in the issuance of the requested charter.

In this case, the Secretary denied Ms. Duran's application, stating that was unlawful for her to use the word "accounting" in her corporate name. Although no specific reason was noted for that prohibition, there can be no doubt that the Secretary's action was based on a construction of the meaning of the Public Accountancy Act of 1979, Article 41a-1 Section 8 (App., p. A-29), that petitioner believes is improper. As discussed, *supra*, Ms. Duran's use of the word "accounting" was not misleading since it does not in and of itself represent or suggest that she is a Certified Public Accountant.

In sum, Ms. Duran's charter should not have been denied on the grounds that she could not use the word "accounting" in her corporate name, and there were no other reasons to deny the charter. Therefore, the charter

must issue. Since the Secretary refused to issue said charter, the Texas Supreme Court should have granted a writ of mandamus directing that the Secretary grant Ms. Duran's application. *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803); *Ex Parte United States*, 242 U.S. 27 (1916).

Although mandamus may not be employed to direct an officer to exercise discretion in any particular manner, a writ may issue against an officer to command that officer to perform a ministerial duty. *Wilbur v. U.S. ex rel. Kadrie*, 281 U.S. 206 (1930). Texas law makes it clear that issuance of a corporate charter by the Secretary to qualified applicants is in no way discretionary. The Texas Secretary of State is empowered to administer that state's Business Corporation Act efficiently and to perform the duties that Act imposes on him. Art. 9.03.

Article 3.03 requires that the original and a copy of the articles of incorporation be delivered to the Secretary. That article then states that

> "If the Secretary of State finds that the articles of incorporation conform to law, he *shall*, when all fees have been paid as required by law: (emphasis added)
>
> . . .
>
> (3) Issue a certificate of incorporation to which he shall affix the copy.
>
> B. The certificate of incorporation, together with the copy of the articles of incorporation affixed thereto by the Secretary of State, *shall* be delivered to the incorporators or their representative." (emphasis added)

Since no discretion may be executed in the performance of a ministerial duty, a writ of mandamus must issue to command performance of that duty.

Petitioner's effort to obtain relief by seeking a writ of mandamus was appropriate because the action sought – the issuance of the corporate charter – is clearly within the authority and normal operation of the Texas Secretary of State, and there is no other plain, speedy and adequate remedy available to petitioner in the ordinary course of law to achieve the same end. *Cf. United States ex rel. Girard Trust Co. v. Helvering*, 301 U.S. 540 (1937).

In Texas, before mandamus may issue, three elements must coexist: (1) a clear right of plaintiff to the relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) no other adequate remedy must be available. *Carter v. Seamans*, 411 F.2d 767 (5th Cir. 1969), *cert denied*, 399 U.S. 941. Here, Ms. Duran is clearly entitled to the relief sought because she fulfilled all of the requirements for people obtaining a corporate charter for her intended business. The Secretary had a clear duty to grant Ms. Duran's application for a corporate charter because, under these circumstances, the Secretary's duty to issue the charter became mandatory.

The Texas Supreme Court failed in its clear duty to grant a writ of mandamus. There is no other adequate remedy available to Ms. Duran because Texas law requires that "[O]nly the Supreme Court has the authority to issue a writ of mandamus . . . against any of the officers of th[e] state . . . to compel the performance of a . . . ministerial act or duty that, by state law, the officer

or officers are required to perform." Tx. Stat. §22.002 (1987).

By refusing to issue a writ of mandamus directing the Secretary to grant Ms. Duran's application for a corporate charter, the Texas Supreme Court denied Ms. Duran, one who met all the lawful requirements for obtaining a charter, her right to that charter. The granting of corporate charters under such circumstances is a ministerial, not discretionary function of the Secretary. The refusal of the Texas Supreme Court to issue the writ of mandamus was improper as a matter of law – that action allowed the Secretary to exceed his authority and deny Ms. Duran the opportunity to obtain the necessary license to pursue a lawful business for which she fulfilled the legal requirements.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. The failure of the Texas Secretary of State to perform the ministerial act of granting petitioner's request for a corporate charter when petitioner met all the valid requirements for such a charter made seeking a writ of mandamus from the Texas Supreme Court the appropriate action. The failure of the Texas Supreme Court to issue that writ because of the proposed use of the word "accounting" in petitioner's proposed corporate name violated petitioner's First Amendment right to engage in truthful commercial speech.

Respectfully submitted,

/s/ Gerald J. Thain
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Attorney for Petitioner

March 19, 1990

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IN THE SUPREME COURT OF TEXAS

NO. C-9157, MARGARET ANN DURAN vs. GEORGE S. BAYOUD, JR., SECRETARY OF STATE	)	November 8, 1989 Original Mandamus Proceeding

Relator's motion for leave to file petition for writ of mandamus filed herein on October 20, 1989, in the above numbered and entitled case having been duly considered, it is ordered that said motion for leave be, and hereby is, overruled.

It is further ordered that relator, Margaret Ann Duran, pay the costs incurred in this Court in this case.

* * *

I, JOHN T. ADAMS, CLERK of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the Order of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the date shown.

WITNESS my hand and the Seal of the Supreme Court of Texas, at the City of Austin, this the 18th day of December, 1989.

JOHN T. ADAMS, CLERK

By Courtland Crocker,
Courtland Crocker,
Deputy Clerk

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No. C-9157

In the

Supreme Court For The State of Texas

Austin, Texas

MARGARET ANN DURAN,

Relator

vs.

GEORGE S. BAYOUD, JR.,
Secretary of State,

Respondent.

PETITION FOR WRIT OF MANDAMUS

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State Bar No. 05208000

ATTORNEY FOR RELATOR

OCTOBER 19, 1989

NAMES OF PARTIES

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No. ___

IN THE SUPREME COURT OF TEXAS

MARGARET ANN DURAN,

Relator

vs.

GEORGE S. BAYOUD, JR., Secretary of State,

Respondent

MOTION FOR LEAVE TO FILE A PETITION FOR MANDAMUS

To the Supreme Court of Texas:

Comes now relator, Margaret Ann Duran, a resident of the City of San Angelo, State of Texas, complaining of the following respondent: George S. Bayoud, Jr., Secretary of State and respectfully hereby moves this Honorable Court to grant to the relator leave to file her petition for the writ of mandamus, herewith tendered, said petition being hereby referred to and made a part of this motion

for all purposes. Accompanying this motion, relator herewith deposits with the clerk the sum of fifty dollars as costs and stands ready to deposit an additional sum, all as required by the Rule of the Court.

Relator prays that said petition for mandamus be filed and that the same be set down for hearing, and for relief, general and special.

Respectfully submitted,

/s/ Francis G. Culhane
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San Angelo, Texas 76903
915/655-9662
ATTORNEY FOR RELATOR.

No. ___

IN THE SUPREME COURT OF TEXAS

MARGARET ANN DURAN,

Relator

vs.

GEORGE S. BAYOUD, JR., Secretary of State

Respondent

PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE SUPREME COURT OF TEXAS

Relator is Margaret Ann Duran, an adult resident of San Angelo, Tom Green County, Texas.

Respondent is George S. Bayoud, Jr., Secretary of State, State of Texas and he is the successor to Jack M. Rains, former Secretary of State.

Relator residence address is 1727 Childress Street, San Angelo, Texas 76901. Respondent George S. Bayoud, Jr., mailing address is PO Box 13697, Austin, Texas 78701 and his business office is located in the State Capitol Building, Room 127, Austin, Texas 78701.

At all material times Relator was and continues to be an adult resident of San Angelo, Tom Green County, and a citizen of the State of Texas and the United States of America.

George S. Bayoud, Jr. was appointed the Secretary of the State of Texas on June 19, 1989. The provisions of the Texas Statutes that apply to the Secretary of State and to

this fact situation are V.A.T.S. Bus. Corp. Act., Art. 3.01 et seq.

On June 15, 1988, Relator mailed duplicate originals of the Articles of Incorporation of Duran's Accounting & Tax Service, Inc. to Jack M. Rains, Respondent's predecessor, together with a cashier's check in the amount of $310.00 to cover the filing fee, franchise tax deposit, and charge for special handling (See attached exhibits A, B, C.).

On June 22, 1988 Relator received a reply dated June 20, 1988 from Respondent's predecessor, Jack M. Rains, Secretary of State, on which at the bottom was typed:

> "You cannot have accounting in your corporate name it implies an unlaw (sic) purpose for a business corporation."

Relator is a "single-parent" with substantial accounting experience who is attempting to establish an "accounting practice" in her hometown of San Angelo, Texas and she desires to establish that practice under the name of Duran's Accounting & Tax Service, Inc. It is obvious that the Secretary of State's restriction on the trade name, which truthfully describes her services, creates an irreconcilable conflict.

Although this refusal to grant a corporate charter to Relator did not specifically set forth a statutory provision or statutory ground, the Respondent's refusal is apparently based on the Public Accountancy Act 1979 Article 41a-1 Section 8.

The refusal of Respondent George S. Bayoud, Jr.'s predecessor, Jack M. Rains, to issue a corporate charter to Relator as applied for is contrary to and in violation of

several decisions by the United States Supreme Court. These decisions are in the area of commercial free speech and one recent leading decision is that of *Central Hudson vs. Public Utilities*, 447 US 557; 65 L.Ed, 2d 319.

Truthful commercial speech is accorded an intermediate level of First Amendment protection. *See, Virginia State Board of Pharmacy v. Virginia Consumer Council, supra*; Tribe *American Constitutional Law*, at 890-904 (2d.ed. 1988). Thus, restrictions such as the one involved here are subject to the four-prong test articulated in *Central Hudson Gas & Electric Corp. v. New York Public Service Commission*, 477 U.S. 557,566 (1980).

> For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries Yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

The State would argue that a non-licensees' use of the term "accounting" fails the first prong of the test; *i.e.*, that such speech is misleading, in that the term "accounting" connotes licensure as a public accountant. Careful analysis, however, suggests otherwise. Texas courts have defined "accountant" as follows:

> One engaged in rendering accounting or auditing service, as distinguished from bookkeeping, on a fee basis, per diem or otherwise, for more than one employer but *generally not possessing all the qualifications of education or experience required of a certified public accountant*; one who offers his

> services professionally [as an accountant] for pay to the general public.

Texas State Board of Public Accountancy v. Fulcher (I), 515 S.W.2d 950, 956 (Tex. Civ. App. – Corpus Christi 1974, writ ref'd n.r.e.). *citing* 1 C.J.S. Accountants at 636 (emphasis added). "Accounting," in turn, is defined by the American Institute of Certified Public Accountants as follows:

> [T]he act of recording, classifying and summarizing in a significant manner and in terms of money, transactions, and events which are, in part at least, of a financial character, and interpreting the results thereof.

Pyle, Larson and Hermanson, *Elementary Accounting* at 1 (1981). Thus anyone engaged in the foregoing activities is engaged in accounting; and anyone engaged in accounting on a fee basis for more than one employer may aptly be labeled an accountant. To that extent, a unlicensed accountant's use of the term accounting is not misleading at all; indeed, in light of the *Fulcher* definition a C.P.A.'s use of the designation "accountant", it could be argued, is more misleading than a non-licensee's use of the term.

Turning to the second and third prongs of the *Central Hudson* test, it is clear that the state has a substantial interest in preventing public confusion regarding licensed accountants. It is less clear, though, that the provision at hand directly advances that interest. Under the Board's interpretation of the Act, unlicensed accountants are left in a hopelessly awkward position: They may lawfully provide accounting services to the public, but apparently may not accurately describe their work. Consequently, the public is left in the dark as to the kinds of services

these individuals legitimately offer. This result does not advance the governmental objective of informing the populace.

Finally, we arrive at the fourth and final prong of the *Central Hudson* test, which demands an inquiry into whether the regulation is any more extensive than necessary to serve the asserted governmental interest. This test brings to light the Public Accountancy's Act most serious constitutional failing. As noted above, the State may not ban potentially misleading information if the information may be presented in a way that is not deceptive. Here, the State has given no consideration to less-restrictive alternatives; It has simply banned the information outright. Such a position flies in the face of well-established case-law – from *Virginia Pharmacy Board* to *Central Hudson*. The highest court of the state of Maryland, reviewing a provision almost identical to the one questioned here, commented:

> To prevent the possibility of public confusion and deception, the legislature cannot consistent with the First Amendment choose the most drastic remedy – the complete suppression of the use of certain words to describe the lawful activity of non-certified accountants. In these circumstances, 14(e)'s prohibition on a non-certified accountant's use of the words "accountant" and "accounting" is inconsistent with the rationale of *Virginia Pharmacy*.

Comprehensive Accounting Service Company v. Maryland State Board of Public Accountancy, 397 A.2d 1019, 1026-127 (Md. Ct. App. 1979). The Texas Public Accountancy Act, like the Maryland statute, unjustifiably imposes the most drastic remedy possible. Because less-restrictive measures

are readily available, the Texas act must be considered inconsistent with the First Amendment.

Texas courts have addressed this contention on two separate occasions. *See Texas State Board of Public Accountancy v. Fulcher,* 515 S.W.2d 950 (Tex.Civ.App. – Corpus Christi 1974, writ ref'd n.r.e.) (*"Fulcher I"*); *Fulcher vs. Texas State Board of Public Accountancy,* 571 S.W.2d 366 (Tex.Civ.App. – Corpus Christi 1978, writ ref'd n.r.e.) (*"Fulcher II"*). Both cases involved actions taken by the Board against W.L. Fulcher, an unlicensed accountant who held himself out to the public as an accountant in violation of Article 41 A-1. *Fulcher I* was decided two years prior to the birth of the commercial speech doctrine in *Virginia Pharmacy Board, supra.* Thus, the *Fulcher I* court did not find any constitutional principle violated by the Public Accountancy Act. *Fulcher II* was almost as inconclusive as its predecessor, despite the fact that the later case was decided two years *after Virginia Pharmacy.* In *Fulcher II,* Mr. Fulcher had failed to raise his constitutional claims at the trial level; thus, the appellate court found it unnecessary to reach the merits of the constitutional issue. 571 S.W.2d at 368-369.

In dicta, however, the *Fulcher II* court did offer its views on Mr. Fulcher's constitutional claims. The Court cited a California case for the proposition that "some usages of the term 'accounting' can mislead or deceive the public." 571 S.W.2d at 369-70. On that basis the Court summarily opined, "[W]e think *Virginia Pharmacy, supra,* and *Bates, supra,* do not control in this situation." 571 S.W.2d at 370.

For several reasons, *Fulcher II* does not control the present situation. First, the court's constitutional arguments were dicta; thus, even if the court had reached a completely contrary result on Mr. Fulcher's free speech claims, the Texas Supreme Court would still have found no reversible error.

Second, the *Fulcher II* court's constitutional arguments were based on an egregious misreading of *Bates v. State Bar of Arizona*, 433 U.S. 354 (1977) and was done without the benefit of the "fleshing out" of the commercial free speech doctrine done by the Supreme Court in recent years. In *Bates*, Arizona's state bar argued that attorney advertising is inherently misleading, and should therefore be suppressed. The Supreme Court, in language that is well worth repeating, rejected that argument:

> Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance. *See, Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. at 769-770, 96 S.Ct. at 1829-1830. Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less. If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.

433 U.S. at 374-75. The message of *Bates* is clear: If the naivete of the public will cause advertising by unlicensed accountants to be misleading, then it is the Board of Public Accountancy's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective. The preferred remedy is *more disclosure*, rather than less. The *Fulcher II* court, however, simply disregarded that message.

The *Fulcher II* court also disregarded a more recent statement by the Supreme Court on commercial speech. In *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977), the Supreme Court voted 8-0 to strike down a township ordinance which banned "For Sale" and "Sold" signs from residential property. The court acknowledged that the ordinance served as an "important governmental objective," 431 U.S. at 94-95, but nonetheless decided that the Constitution forbade the particular means chosen to serve that objective:

> "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." [*Virginia Pharmacy Bd.*,] 425 U.S. at 770, 96 S.Ct. at 1829.
>
> Or as Mr. Justice Brandeis put it: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Whitney v. California*, 274 U.S. 357, 377, 47 S.Ct. 641, 649, 71 L.Ed. 1095 (1972) (concurring opinion).

431 U.S. at 91. The *Fulcher II* court without explanation, ignored the "more speech" suggestion – and, for that matter, the entire opinion – of *Linmark Associates*.

In some sense, the mistakes of the *Fulcher II* court are understandable: The commercial speech doctrine was new at that time and although the Supreme Court's advances in the area have been clear, one might not expect every lower court to proceed apace. Now, however, ten years have passed since *Fulcher II*; and over that decade, courts have become more adept at assimilating commercial speech into the First Amendment. Professor Tribe recently noted that, "But, for a doctrine in its infancy, the 'commercial speech' doctrine has demonstrated remarkable vigor." Tribe, *American Constitutional Law* at 895 (2d.Ed. 1988). Supreme Court opinions since *Fulcher II* have placed special emphasis on the issue of "fit"; i.e., whether the challenged regulation is more extensive than necessary to serve the stated governmental purpose. *See, e.g., Zauderer v. Office Counsel*, 105 S.Ct. at 2278 (1985); *In re R.M.J.*, 455 U.S. at 203-04 (1982); *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. at 565 (1980).

If the import of *Virginia Pharmacy Board, Linmark Associates*, and *Bates* was unclear in 1978, it is certainly clear by now. When a certain type of information is potentially misleading, the state may require a disclaimer or explanation in advertising to "dissipate the possibility of consumer confusion or deception." *In re R.M.J.*, 455 U.S. at 201. The state may not, however, enforce a prophylactic ban on the information if the state's purpose in doing so could be served by less-restrictive means. The burden is on the state to explore those less-restrictive alternatives,

and to establish that they would be ineffectual. *Zauderer*, 105 S.Ct. at 2278-79; *In re R.M.J.*, 455 U.S. at 206; *Central Hudson*, 477 U.S. at 570.

As a final matter, neither the Public Accountancy Act nor *Fulcher II* purports to bar an unlicensed accountant from truthfully stating that he provides accounting services. Both the Act and the opinion focus on one's designation rather that on the general content of one's advertising. Thus, the State's position on this point – that a non-licensee may provide accounting services, but may not state publicly that he is doing so – is without foundation. The State is simply seeking to apply the statute as broadly as its imagination allows. The Constitution, thankfully, requires greater attentiveness to the public's legitimate interest in access to information.

Wherefore, Relator prays that a writ of mandamus be issued forthwith directing George S. Bayoud, Jr., Secretary of State to issue a corporate charter as applied for by Relator.

By: /s/ Francis G. Culhane
FRANCIS G. CULHANE,
#05208000
103 S. Irving, Suite 801
San Angelo, Texas 76903
915/655-9662
ATTORNEY FOR
RELATOR.

THE STATE OF TEXAS ::
::
COUNTY OF TOM GREEN ::

Before me the undersigned authority on this day personally appeared Francis G. Culhane, who being by

me first duly sworn did on his oath depose and say that he is of counsel in the above styled proceedings; that as such he is authorized to make this affidavit; that he has read the foregoing Petition for a Writ of Mandamus and the facts stated therein and the allegations therein made are true and correct; and further that he has been furnished originals of the attached three exhibits: Exhibit A, Articles of Incorporation; Exhibit B, cashier's check; Exhibit C, denial by the Secretary of State of the charter application of Margaret Ann Duran; and he verifies and certifies that these are true and correct copies of said originals.

/s/ Francis G. Culhane
FRANCIS G. CULHANE,
#05208000
103 S. Irving, Suite 801
San Angelo, Texas 76903
915/655-9662
ATTORNEY FOR RELATOR.

Subscribed and sworn to before me this 19th day of October, 1989.

/s/ Elaine A. Archut
Notary Public in and for
Tom Green County, Texas.

Elaine A. Archut
Notary Public
STATE OF TEXAS
My Comm. Exp. 12/08/90

CERTIFICATE OF SERVICE

A copy of this Motion for Leave to File a Petition for Mandamus and the Petition for Writ of Mandamus has

been sent addressed to George S. Bayoud, Jr., Secretary of State, State Capitol Building, Room 127, Austin, Texas 78701, Respondent, by Federal Express to Carol Hines, Prentice Hall Legal Services, 807 Brazos, Suite 600, Austin, Texas 78701, who is to hand deliver it to the Secretary of State's office in the State Capitol Building, Room 127.

This material left San Angelo, Texas on the 19th day of October, 1989.

/s/ Francis G. Culhane
FRANCIS G. CULHANE,
#05208000
103 S. Irving, Suite 801
San Angelo, Texas 76903
915/655-9662
ATTORNEY FOR RELATOR.

EXHIBIT "A-1"

MARGARET ANN DURAN
1727 Childress Street
San Angelo, Texas 76901
(915) 944-7059

June 15, 1988

SECRETARY OF STATE
Corporate Division
P. O. Box 13697
Austin, Texas 78711

Dear Sir:

Enclosed are duplicate originals of Articles of Incorporation for a business to be known as:

DURAN'S ACCOUNTING & TAX SERVICES, INC.

and a cashier's check on the Central National Bank, San Angelo, Texas. The cashier's check is in the amount of $310.00 and is intended to cover the filing fee, the franchise tax deposit, and the charge for special handling.

Very truly yours,

MARGARET ANN DURAN

mad

Enclosures

EXHIBIT A-2

ARTICLES OF INCORPORATION

OF

DURAN'S ACCOUNTING & TAX SERVICES, INC.

I, the undersigned natural person of the age of eighteen years or more, a citizen of the State of Texas, acting as incorporator of a corporation under the Texas Business

Corporations Act, do hereby adopt the following articles of incorporation.

ARTICLE ONE

The name of the corporation is DURAN'S ACCOUNTING & TAX SERVICES, INC.

ARTICLE TWO

The period of its duration is perpetual.

ARTICLE THREE

The purposes for which the corporation is organized are:

The transaction of any and all lawful business for which corporations may be incorporated under the Texas Business Corporation Act.

ARTICLE FOUR

The aggregate number of shares which the corporation shall have the authority to issue is one hundred thousand (100,000), each share at no par value.

ARTICLE FIVE

The corporation will not commence business until it has received for the issuance of its shares consideration of the value of $1,000.00 consisting of money, labor done or property actually received.

ARTICLE SIX

The address of the corporation's registered office is:

1727 Childress Street
San Angelo, Texas 76901

and the name of its registered agent at such address is:

MARGARET ANN DURAN

EXHIBIT A-3

ARTICLE SEVEN

The number of initial directors is one (1) and the name and address of the persons who are to serve as director until the first annual meeting of the shareholders, or until his or her successor is duly elected and qualified is as follows:

Margaret Ann Duran
1727 Childress Street
San Angelo, Texas 76901

ARTICLE EIGHT

The name and address of the incorporator is:

MARGARET ANN DURAN
1727 Childress Street
San Angelo, Texas 76901

IN WITNESS WHEREOF, I have hereunto set my hand this 15 day of June, 1988.

/s/ Margaret Ann Duran
Margaret Ann Duran,
Incorporator

THE STATE OF TEXAS ( )

COUNTY OF TOM GREEN ( )

I, the undersigned Notary Public, do hereby certify that on this the 15th day of June, 1988, personally appeared before me MARGARET ANN DURAN, who being duly sworn, declared that she is the person who executed the foregoing document as incorporator and the statements contained therein are true and correct.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this day and year before written.

/s/ C. Kay Hunt
Notary Public, State of Texas
Printed Name: C. Kay Hunt
My Commission Expires: 5-14-91

PURCHASER'S RECEIPT - RETAIN FOR YOUR RECORDS

dao

CASHIER'S CHECK

307452

REMITTER

Margaret Ann Duran

88-30/1113

PAYABLE TO SECRETARY OF STATE NOT NEGOTIABLE $ *310.00

The Central Bank
CENTRAL NATIONAL BANK
Area Code 915/655-0561
Post Office Box 1891
San Angelo, Texas 76902

MEMORANDUM

FOR

⑈307452⑈ ⑆113009031⑆ ⑈0009⑉202⑉9⑈

EXHIBIT B

A-23

EXHIBIT C-1

SEAL

OFFICE OF THE SECRETARY OF STATE

June 20, 1988

Return to: Secretary of State
Corporations Division
P.O. Box 13697
Austin, Texas 78711-3697
(512) 463-5583

Jack M. Rains
SECRETARY OF STATE
Margaret ann Duran
1727 Childress St.
San Angelo Tx 76901

RE: DURAN'S ACCOUNTING & TAX SERVICES, INC.

The following corrections are necessary for approval and filing of the documents submitted on behalf of the above named corporation.

THE DOCUMENT(S) AND CHECK(S) WHICH YOU SUBMITTED ARE ENCLOSED.

1. ___ The corporate name is not available because it is the same as, or deceptively similar to, that of an existing corporation named _____.

2. ___ The corporate name is available only with a letter consenting to use of a similar name from a corporation named _____.

3. ___ The above referenced name may be reserved upon receipt of a letter requesting reservation and a $25.00 filing fee.

4. ___ For a preliminary check on name availability before resubmitting your Articles, call (512) 463-5555.

5. ___ The corporate name must include one of the following words or abbreviations: COMPANY, CORPORATION, INCORPORATED, CO., CORP., INC.

6. ___ The Articles of Incorporation must set forth the term of existence of the corporation. The existence may be perpetual.

7. ___ The Articles of Incorporation must set forth the number of shares which the corporation shall have authority to issue, and the par value of the shares, or a statement that the shares are without par value.

8. ___ The Articles of Incorporation must state:

   "The corporation will not commence business until it has received for the issuance of shares consideration of the value of One Thousand Dollars ($1,000) consisting of money, labor done or property actually received."

9. ___ The Articles of Incorporation must include the street or building address for the registered office of the corporation. A post office box alone is not sufficient.

10. ___ The Articles of Incorporation must set forth the name of the registered agent for the corporation; the corporation may not serve as its own registered agent. The articles must indicate that the address of the registered agent is the same as the address of the registered office.

11. ___ The Articles of Incorporation must set forth the name(s) and address(es) of the initial director(s).

12. ___ The Articles of Incorporation must give the name(s) and address(es) of the incorporator(s).

*YOU CANNOT HAVE ACCOUNTING IN YOUR CORPORATE NAME, IT IMPLIES AN UNLAW PURPOSE FOR A BUSINESS CORPORATION

EXHIBIT C-2

13. ___ All incorporators must sign the Articles of Incorporation.

14. ___ An executed original and duplicate copy of the Articles of Incorporation must be submitted.

15. ___ Furnish $300 remittance in satisfaction of the $200 statutory filing fee and the $100 franchise tax prepayment.

16. ___ In addition to the $200 filing fee, the corporation must prepay an initial franchise tax deposit of $100 as a precondition to issuance of the certificate of incorporation.

17. ___ To elect close corporation status, the Articles of Incorporation should include the statement: "This corporation is a close corporation."

18. ___ The Articles of Incorporation should state the name(s) and address(es) of the person or persons who, pursuant to the shareholders' agreement, will perform the functions of the initial board of directors.

THE STATE OF TEXAS ::

COUNTY OF TOM GREEN ::

I, FRANCIS G. CULHANE, verify and certify that the above and foregoing, approximately a page and one-third, which is on the stationery of the Secretary of State, is a true and correct copy of the actual denial by the then Secretary of State, Jack M. Rains, of the charter application of Margaret Ann Duran.

/s/ Francis G. Culhane
FRANCIS G. CULHANE

Subscribed and sworn to before me this 19th day of October, 1989.

/s/ Elaine A. Archut
Notary Public in and for
Tom Green County, Texas.

Elaine A. Archut
Notary Public
STATE OF TEXAS
My Comm. Exp. 12/08/90
(SEAL)

LAW OFFICE OF
FRANCIS G. CULHANE
103 S. IRVING, SUITE 801
SAN ANGELO, TEXAS 76903

TELEPHONE 855-8882
AREA CODE 815

December 20, 1989

Gerald Thain, Dean
208 Law Building
University of Wisconsin Law School
Madison, WIsconsin 53706

RE: Margaret Ann Duran v. George S. Bayoud, Jr., Secretary of State C-9157

Dear Gerald,

Enclosed please find the certified copy of the order overruling the motion for leave to file petition for writ of mandamus in the Supreme Court of Texas. By this letter I am also sending copies of this same motion to the other individuals involved in this proceeding.

Please call me if you need any other information.

Sincerely,

/s/ Francis S. Culhane
Francis G. Culhane

FGC:kjf

cc: Bill Golden
1200 West Third Street
Roswell, NM 88201

Charles Seward
610 Gold Avenue, Ste 100
Albuquerque, NM 87102

William H. Sager
1010 N. Fairfax Street
Alexandria, VA 22314

Thomas Harrell, Jr.
P.O. Box 4847
Midland, TX 79704

PUBLIC ACCOUNTANCY ACT OF 1979, ARTICLE 41A-1 SECTION 8

Prohibition against practicing without permit

Sec. 8. (a) No person shall assume or use the title or designation "certified public accountant," or the abbreviation "C.P.A." or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such person is a certified public accountant, unless such person has received a certificate as a certified public accountant under Section 12 or Section 13 of this or prior Acts, holds a permit issued under Section 9 of this Act which is not revoked or suspended (hereinafter referred to as a "live permit"), and all of such person's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 of this Act; provided, however, that an accountant of another state or foreign country who has registered under the provisions of Section 14 of the Public Accountancy Act of 1945, and who holds a live permit issued under Section 9 of this Act, may use the title under which he is generally known in his state or country, followed by the name of the state or country from which he received his certificate, license or degree.

(b) No partnership shall assume or use the title or designation "certified public accountant" or the abbreviation "C.P.A." or any other title, designation, words, letters, abbreviation, sign, card or device tending to indicate that such partnership is composed of certified public accountants unless such partnership is registered as a partnership of certified public accountants under Section 17 of the Public Accountancy Act of 1945, holds a live permit issued under Section 9 of this Act and all of such

partnership's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof.

(c) No person shall assume or use the title or designation "public accountant" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such person is a public accountant, unless such person is registered as a public accountant under Section 11 or Section 13 of the Public Accountancy Act of 1945, holds a live permit issued under Section 9 of this Act and all of such person's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof, or unless such person has received a certificate as a certified public accountant under Section 12 or Section 13 of this or prior Acts, holds a live permit issued under Section 9 of this Act and all of such person's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof.

(d) No partnership shall assume or use the title or designation "public accountants" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such partnership is composed of public accountants, unless such partnership is registered as a partnership of public accountants under Section 19 of the Public Accountancy Act of 1945, or as a partnership of certified public accountants under Section 17 of the Public Accountancy Act of 1945, and holds a live permit issued under Section 9 of this Act and all of such partnership's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof.

(e) No person shall assume or use the title or designation "certified accountant," "chartered accountant," "enrolled accountant," "licensed accountant," or any other title or designation likely to be confused with "certified public accountant" or "public accountant," or any of the abbreviations, "CA," "PA," "EA," "RA," or "LA," or similar abbreviations likely to be confused with "CPA"; provided, however, that only a person holding a live permit issued under Section 9 of this Act and all of whose offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof may hold himself out to the public as an "accountant" or "auditor" or combinations of said terms; and provided further, that a foreign accountant registered under Section 14 of the Public Accountancy Act of 1945, who holds a live permit issued under Section 9 of this Act and all of whose offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof, may use the title under which he is generally known in his state or country, followed by the name of the state or country from which he received his certificate, license or degree.

(f) No corporation shall assume or use the title or designation "certified public accountant," or "public accountant," nor shall any corporation assume or use the title or designation "certified accountant," "chartered accountant," "enrolled accountant," "license accountant," "registered accountant," or any other title or designation likely to be confused with "certified public accountant" or "public accountant," or any of the abbreviations "CPA," "PA," "EA," "RA," or "LA", or similar abbreviations likely to be confused with "CPA." If a corporation

was registered under Section 10 of the Public Accountancy Act of 1945, prior to November 1, 1945, and holds a live permit under Section 9 hereof, it may use the same designations applicable to certified public accountants or public accountants hereinabove set out.

(g) No person shall sign or affix his name or any trade or assumed name used by him in his profession or business, with any wording indicating that he is an accountant or auditor, or with any wording indicating that he has expert knowledge in accounting or auditing, to any accounting or financial statement, or to any opinion on, report on or certificate to any accounting or financial statement, unless he has complied with the applicable provisions of this Act; provided, however, that the provisions of this Subsection shall not prohibit any officer, employee, partner, or principal of any organization from affixing his signature to any statement or report in reference to the financial affairs of said organization with any wording designating the position, title or office which he holds in said organization, nor shall the provisions of this Subsection prohibit any act of a public official or public employee in the performance of his duties as such.

(h) No person shall assume or use the title or designation "certified public accountant" or "public accountant" in conjunction with names indicating or implying that there is a partnership or in conjunction with the designation "and Company," or "and Co.," or a similar designation if, in any such case, there is in fact no bona fide partnership registered under Sections 17 or 19 of the Public Accountancy Act of 1945; provided that a partnership lawfully using such title or designation in conjunction with such names or designation on the effective date

of this Act, may continue to do so if it otherwise complies with the provisions of this Act.